

April 30, 2019

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Via ECF Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: Notice of *Ex Parte* Presentation by NorthStar Alarm Services, LLC, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278

Dear Secretary Dortch:

Pursuant to Section 1.1206 of the Federal Communication Commission's ("FCC") rules, the undersigned counsel hereby provides notice that, on April 29, 2019, NorthStar Alarm Services, LLC's General Counsel, Jared Parrish, and Venable attorneys Daniel Blynn, Ian Volner, and Liz Clark Rinehart (collectively "NorthStar") met with the following in the Consumer & Governmental Affairs Bureau: Mark Stone, Deputy Bureau Chief; Kurt Schroeder, Chief, Consumer Policy Division; Kristi Thornton, Associate Chief, Consumer Policy Division; Karen Schroeder, Attorney Advisor; Richard Smith, Attorney Advisor, Consumer Policy Division; and Christina Clearwater, Attorney Advisor. That same day, NorthStar also met separately with Michael Scurato, Legal Advisor for Media and Consumer Protection for Commissioner Geoffrey Starks; Travis Litman, Chief of Staff and Wireline and Public Safety Advisor for Commissioner Jessica Rosenworcel; Commissioner Michael O'Rielly and Arielle Roth, Wireline Legal Advisor to Commissioner O'Rielly; and Jamie Susskind, Chief of Staff and Wireline and Consumer Protection Legal Advisor to Commissioner Brendan Carr.

During the meetings, NorthStar urged the Commission to grant its pending Petition for expedited declaratory ruling in the above-referenced proceeding (the "Petition").¹ In the Petition, NorthStar seeks clarification that the use of soundboard technology does not constitute the use of "an artificial or prerecorded voice to deliver a message" under Section 227(b)(1)(B) the Telephone Consumer Protection Act ("TCPA"). Critically, soundboard technology involves a live operator on *every* call placed to consumers, ensuring that the communications are interactive and tailored to the

¹ NorthStar Alarm Services, LLC, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Jan. 2, 2019).

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consumer's unique requests and responses. As used by the company that NorthStar engaged to generate leads, Yodel Technologies, LLC, the soundboard technology was deployed in a strict one-to-one manner (*i.e.*, a single, live soundboard agent having a single conversation with a single consumer at a time) with the agent on the call every second, and no soundboard audio clip being played without that agent's conscious decision and affirmative action to play such clip. NorthStar reiterated that application of Section 227(b)(1)(B) to every call that has a recorded message is inconsistent with the language of the TCPA, its purpose, and the public interest. NorthStar further explained that it also would lead to inconsistent, unintended, and absurd results as to how Section 227(b)(1)(B) applies with respect to other provisions of the TCPA, such as Section 227(d)(3)(A)'s identification requirements,² as well as other statutes and regulations, including the "recorded message that must play" provision of the call abandonment safe harbor of the Federal Trade Commission's Telemarketing Sales Rule,³ and state laws and attorney general settlements requiring that call monitoring disclosures be provided at the outset of calls by way of a prerecorded message.⁴ In short, as NorthStar noted at the meetings, callers may be faced with a Catch 22 – either treat each soundboard audio clip as the delivery of a separate message under the TCPA and violate other laws, or vice-versa.

As we have noted, NorthStar is currently the defendant in a certified TCPA class action directly related to the issues raised in its Petition, and the Court has set May 8, 2019 as the deadline for summary judgment motions on these very issues. During the April 29, 2019 meetings at the Commission, NorthStar handed out excerpts from the transcript of a recent hearing in that case and noted the Court's various statements explaining the value of guidance from the Commission on whether soundboard technology "delivers a message" as proscribed by Section 227(b)(1)(B): "admittedly, if we had final agency action with holy water poured on it by the DC Circuit, that would command a broader national compliance, if you will, then my ruling and then the Tenth Circuit's ruling. . . . The FCC certainly has something to offer on that score that a strictly Article

² For example, if each soundboard audio clip were construed to deliver the singular, passive message that the TCPA was designed to prohibit, then each separate audio clip used to have a dynamic, real-time, two-way conversation with a consumer itself would have to identify the caller's name, and phone number or address.

³ 16 C.F.R. § 310.4(b)(4)(iii).

⁴ *See, e.g., California v. Wells Fargo Bank, N.A.*, No. BC611105 (Cal. Super. Ct. Mar. 28, 2016), *Stip. Final Judgment*, ¶ 3 ("Wells Fargo . . . shall make a clear, conspicuous, and accurate disclosure (the 'Recorded Call Disclosure') to any such consumer of the fact of recording, and to make such disclosure immediately at the beginning of any such communication."). Other examples of such unintended and absurd results were set forth in NorthStar's reply comments in support of its Petition. *See* NorthStar Reply Comments, at 3 n.6 & 4.

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III approach does not have to offer . . .”⁵ As evident from the Court’s comments, the Commission’s silence on this issue is unfair to both NorthStar and antithetical to the public interest.

For the reasons discussed in its Petition and above, NorthStar respectfully requests that the Commission move quickly to grant its Petition and declare that the use of soundboard technology – either generally or in the manner used relevant to the calls at issue in the TCPA litigation – does not constitute the use of an artificial or prerecorded voice that “delivers a message” under Section 227(b)(1)(B) the TCPA.

Respectfully submitted,



Daniel S. Blynn

Counsel for NorthStar Alarm Services, LLC

Enclosure

cc: Mark Stone
Kurt Schroeder
Kristi Thornton
Karen Schroeder
Richard Smith
Christina Clearwater
Michael Scurato
Travis Litman
Commissioner Michael O’Rielly
Arielle Roth
Jamie Susskind

⁵ *Braver v. NorthStar Alarm Services LLC, et al.*, No. 5:17-cv-00383-F (W.D. Okla.), Mar. 6, 2019 Tr. of Hrg. on NorthStar’s Mot. to Stay, at 53:18-21, 55:9-10. A copy of the excerpted transcript of the hearing on NorthStar’s Motion to Stay is attached to this letter as Exhibit “A” for the record.

Exhibit A

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF OKLAHOMA

3
4 ROBERT H. BRAVER,

5 Plaintiff,

6 vs.

Case No. CIV-17-383-F

7 NORTHSTAR ALARM SERVICES, LLC,
8 and YODEL TECHNOLOGIES, LLC,

9 Defendants.

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13 TRANSCRIPT OF MOTION HEARING
14 BEFORE THE HONORABLE STEPHEN P. FRIOT
15 UNITED STATES DISTRICT JUDGE

16 MARCH 6, 2019

17 2:30 P.M.
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25 Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

Tracy Thompson, RDR, CRR
United States Court Reporter
U.S. Courthouse, 200 N.W. 4th St.
Oklahoma City, OK 73102 * 405.609.5505

APPEARANCES

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MS. ANNE E. ZACHRITZ
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Oklahoma City, OK 73102

1 briefing being completed and oral argument.

2 THE COURT: You may continue.

3 MR. FREELAND: And, Your Honor, the third point about
4 class notice -- and, again, this is something that is an issue
5 in any class action where you've got movement -- you know,
6 potential movement of class members, you know, after the
7 complaint is filed, before certification, after
8 certification -- Your Honor obviously has wide discretion in
9 determining a class notice.

10 One way to alleviate that could be to notify them that
11 there is this proceeding at the FCC and that the case has been
12 stayed pending that determination and that class members are
13 welcome to submit comments with the FCC. That's just one idea
14 to deal with that, Your Honor.

15 THE COURT: Thank you.

16 MR. FREELAND: And with that, Your Honor, unless you
17 have any other questions, I will sit down.

18 THE COURT: Okay. Thank you.

19 MR. FREELAND: Thank you, Your Honor.

20 THE COURT: Ms. Zachritz, again, I certainly don't
21 mean to cut you off.

22 MS. ZACHRITZ: I have nothing to add, Your Honor.

23 THE COURT: Okay. Thank you.

24 Counsel, just -- if you would, stand by for just a moment.

25 I do have the benefit of not only good briefing -- and I

1 certainly have -- but good arguments, which I also certainly
2 have. And I do appreciate the time and the effort and the
3 professionalism that went into the briefing, as well as the
4 arguments. And I'm not just saying that. I really do mean
5 that.

6 Obviously, the framework for my determination as to
7 whether to stay this action falls into two spheres: One is the
8 doctrine of primary jurisdiction, the other one is my inherent
9 power to control my own docket. And if the defendants persuade
10 me on either one, then the action gets stayed.

11 Turning to the first framework first, and that is the
12 doctrine of primary jurisdiction, of course, as we all know in
13 one sense, or at least in the sense that Article III courts
14 usually use the word "jurisdiction," it's not strictly speaking
15 a subject matter jurisdiction issue. Subject matter
16 jurisdiction is not a matter addressed to a Court's discretion.
17 And I think I can fairly say that application of the doctrine
18 of primary jurisdiction is addressed to the Court's carefully
19 guided discretion and certainly not unbridled discretion.

20 The Court of Appeals has made it clear that -- first, that
21 there is no fixed formula for applying the doctrine of primary
22 jurisdiction. That's actually from the U.S. Supreme Court.
23 And taking its cue from that, the Court of Appeals has given us
24 what I consider to be very valuable guidance, and that guidance
25 is to be found in cases like the Crystal Clear Communications

1 case and other cases from the Court of Appeals.

2 Interestingly enough, a good many of the primary
3 jurisdiction cases evaluate the issue to be addressed either by
4 a court or by a regulatory agency as an issue of fact, and I
5 think here I have perhaps either an issue of fact or a mixed
6 question of fact and law, but that's not really briefed by the
7 parties and so I'm not going to dwell on that, nor do I think
8 that makes much difference.

9 But we are taught by the Court of Appeals that one thing I
10 look at is whether the resolution of this issue, be it an issue
11 of fact or law -- and, again, a good many of the cases look --
12 deal with issues of fact -- I examine whether or not the issue
13 that one party proposes that I lateral to an administrative
14 agency or defer to an administrative agency for resolution is
15 or is not within the conventional experience of judges.

16 The second factor that I look at is whether -- it's not a
17 factor, this is an alternative basis for primary jurisdiction,
18 whether the matter requires the exercise of administrative
19 discretion.

20 The third consideration is whether the matter requires
21 uniformity and consistency in the regulation of the business
22 entrusted to the particular agency.

23 And relevant to that is the fact that it's -- it is not
24 inappropriate to take notice of the fact that a given issue, as
25 to which primary jurisdiction arguments are addressed, is, in

1 fact, pending before the agency in question, as it is here.

2 What -- that is the framework under which I am to address
3 the matter as a question of primary jurisdiction.

4 What it boils down to is that the overriding issue -- and
5 it doesn't very often work out quite this way -- but the
6 overriding issue is as to how the import of a statutory phrase,
7 "artificial or prerecorded voice," and probably it's not even
8 that long, it's probably just "prerecorded voice," how that
9 statutory phrase stacks up against the way this soundboard
10 technology works.

11 I do note that the FCC has not been asked to promulgate a
12 formal regulatory exemption. Instead, the FCC has been asked
13 to do what I'm asked to do in this case, and that is interpret
14 how that statutory phrase -- or what that statutory phrase
15 means and how it applies to the facts of the technology
16 involved in this case.

17 And, frankly, there's probably not much, if any, and
18 probably not any real dispute in this case, in this court, at
19 least, as to how the soundboard technology, in fact, works.

20 So the FCC is being asked to do something that both
21 regulatory agencies and courts regularly do, and a court is
22 correspondingly being asked to do something that both courts
23 and regulatory agencies do, namely, look at statutory language
24 and decide what it means.

25 And that brings me back to the question of whether under

1 these Tenth Circuit considerations that I've already alluded to
2 I should defer for an undetermined length of time to the
3 Federal Communications Commission.

4 On that score, the issue -- the aspect of the matter that
5 for me carries the day is the very simplicity of the issue. I
6 do not see this as an issue that is going to result in either
7 me or the FCC having to work through an administrative record
8 that includes boxes and boxes of materials, other than perhaps
9 comments at the FCC, I don't see that there's an issue that
10 requires extensive study of exactly how the soundboard
11 technology works.

12 The papers that are already before the Court demonstrate
13 to me that the essential features of the functioning of the
14 soundboard technology are not difficult to understand,
15 especially as relevant to how they square up with the very
16 short concise statutory phrase at issue.

17 I have to determine whether, as Mr. Freeland calls it,
18 "the snippets" which are already recorded do or do not square
19 up with the language "an artificial or prerecorded voice."

20 I'm entirely unpersuaded that the complexity of this issue
21 is such that I should stay this action for an undetermined
22 duration by hitching my docket to the docket of the Federal
23 Communications Commission, let alone the docket of the DC
24 Circuit.

25 And make no mistake about it, this is a matter which would

1 end up in the DC Circuit from the FCC, because any meaningful
2 action taken by the FCC is going to leave one side or the other
3 deeply aggrieved with the outcome.

4 And I'm sure the FCC will take final agency action within
5 the meaning of the applicable administrative legislation so
6 that that final agency action will be fair game for review in
7 the DC Circuit.

8 Now, in the same breath, I want to say that the one part
9 of it that gives me pause is really the third consideration
10 given to us by the Court of Appeals, and that is whether there
11 is -- is a need for uniformity and consistency in the
12 regulation of the business entrusted to the particular agency.
13 In this case, there is.

14 But as I see it, it's going to be a while, whether it be
15 through the FCC, to the DC Circuit, or from this Court to the
16 Tenth Circuit, it's going to be a while before we get anything
17 that is definitive in any national sense.

18 And, admittedly, if we had final agency action with holy
19 water poured on it by the DC Circuit, that would command a
20 broader national compliance, if you will, than my ruling and
21 then the Tenth Circuit's ruling.

22 But I really don't see any glaring discrepancy, glaring
23 difference, between the uniformity and consistency that is
24 available within a reasonable period of time from the judicial
25 branch, from here to Denver, than would be available from the

1 FCC to the DC Circuit.

2 Going to the first factor considered by the Court of
3 Appeals and that is -- not factor, these are alternative
4 disjunctive bases for primary jurisdiction -- whether the
5 matter is within the conventional expertise of judges, I can
6 tell you without hesitation that the application of this
7 statute to these facts is far less complex than matters that
8 are routinely entrusted to the judicial branch by way of
9 interpretation of statutory language in light of a hideously
10 complex factual record that happens day in and day out.

11 Yes, this is a matter within the conventional experience
12 of judges, and I say that acknowledging in the same breath that
13 it's also a matter within the conventional experience of the
14 FCC.

15 The suggestion that this issue might require the exercise
16 of administrative discretion seems to me to be a bit hollow for
17 this reason: I have a hard time imagining that, in light of
18 language of this kind, a legislative expression this concise,
19 administrative discretion in the sense that has been suggested
20 here that they might decide, well, handicapped people ought to
21 have a break, we ought to interpret this language in a certain
22 way to give handicapped people a break -- I don't see that sort
23 of leeway in the statutory language.

24 The plaintiff may be right as a matter of interpretation
25 or may be wrong, but I don't see that sort of leeway or, for

1 that matter, any other substantial playing field, if you will,
2 for importing generalized policy considerations into the
3 interpretation of the statute.

4 So the most telling factor from the defendant's
5 perspective in my view is the need for uniformity and
6 consistency but, for the reasons I've said, I am not terribly
7 impressed by that in terms of just exactly how we would get
8 that uniformity and consistency.

9 The FCC certainly has something to offer on that score
10 that a strictly Article III approach does not have to offer
11 but, after all, it's going to end up in an Article III court
12 one way or another in any event.

13 Now, the argument on the other side of that is, well, if
14 it goes to the Tenth Circuit, then that's just one circuit
15 court, whereas if it goes to the Court of Appeals in
16 Washington, that is one circuit court addressing a
17 determination of nationwide import. I do understand that.

18 But either way, it can get Court of Appeals treatment
19 without undo delay from this Court to the Tenth Circuit Court
20 of Appeals, which is probably where it would end up in any
21 event if the matter is resolved by this Court.

22 Many of the same considerations do inform my evaluation of
23 the matter in terms of my inherent authority to control my
24 docket and lead me to the same conclusion, and that is that a
25 stay should be denied on that basis, as well.

1 And in terms of my inherent authority to control my
2 docket, I can be a bit more unvarnished in my expression of my
3 concern about the time factor. And I don't get from the Tenth
4 Circuit cases on primary jurisdiction that the time factor is
5 the be all and end all and, for that reason, I do not evaluate
6 primary jurisdiction by letting the time factor be the be all
7 and end all.

8 But the time factor becomes, I think, significantly more
9 prominent when it is taken into account as a factor informing
10 my evaluation of the application of my inherent authority to
11 control my docket. That's where I am every day required to
12 take into account Rule 1 of the Federal Rules of Civil
13 Procedure. I decline to hitch my docket to the FCC's docket
14 for what is very clearly an undetermined length of time. And
15 for that reason, the motion to stay is denied.

16 That does bring us to the motion to approve class action
17 notice. I'm prepared to address that motion very promptly, and
18 I assure counsel on both sides that I will address that matter
19 very promptly.

20 Anything further in this matter from the plaintiff?

21 MR. CATALANO: No, Your Honor.

22 THE COURT: From the defendant?

23 MR. FREELAND: No, Your Honor.

24 THE COURT: From the other defendant?

25 MS. ZACHRITZ: No, Your Honor.

1 THE COURT: Court will be in recess.

2 (COURT ADJOURNED.)

3
4 CERTIFICATE OF OFFICIAL REPORTER

5 I, Tracy Thompson, Federal Official Realtime Court
6 Reporter, in and for the United States District Court for the
7 Western District of Oklahoma, do hereby certify that pursuant
8 to Section 753, Title 28, United States Code that the foregoing
9 is a true and correct transcript of the stenographically
10 reported proceedings held in the above-entitled matter and that
11 the transcript page format is in conformance with the
12 regulations of the Judicial Conference of the United States.

13 Dated this 13th day of March 2019.

14
15 /S/ Tracy Thompson

16 -----
17 Tracy Thompson, RDR, CRR
18 Federal Official Court Reporter
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